NO. 41819-3-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

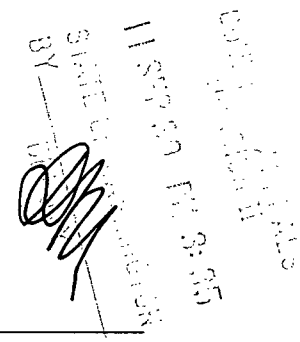
STATE OF WASHINGTON,

Respondent,

v.

JESUS ESCOBAR,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Sally Olsen, Judge

BRIEF OF APPELLANT

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3. The court erred in concluding there was no claim the appellant had difficulty understanding his attorney.

4. The appellant was denied effective assistance of counsel at the trial level, making his plea involuntary.

Issues Pertaining to the Assignments of Error

1. After reviewing defendant's motion to withdraw guilty plea and the accompanying declarations, the court concluded that the motion should be granted unless the State could show good cause why it should not. Following a hearing in which the court took almost no testimony, the court agreed with the State that a defendant cannot prevail on an ineffective assistance of counsel claim based solely on a defendant's allegations. Did the lower court misapply the law in denying the defense motion?

2. Defense counsel did not interview any witnesses and waited until two days before the court date to meet with his in-

custody client for the first time. Further, despite the trial court's earlier determination than an interpreter was needed, the attorney's only meeting with his client occurred without an interpreter. Where all of the evidence presented established that appellant was denied effective assistance of counsel, did the court err in denying defendant's motion to withdraw the guilty plea?

II. STATEMENT OF FACTS

1. Procedural Facts

The State charged Jesus Escobar with burglary in the second degree.[1] The incident allegedly occurred on July 21, 2005; Jesus Escobar was picked up the following morning and placed in custody. An arraignment was held on July 22, 2005. At that time, the Court determined that Mr. Escobar needed an interpreter, so the matter was put over until July 25, 2005 in order to provide an interpreter.[2] Because of a misunderstanding as to Mr. Escobar's prior criminal history (someone had been using his name), bail was set at $100,000.[3]

Following the arraignment on July 25th, Jesus Escobar received an omnibus date of August 17, 2005, and a trial date of

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[1] CP 1-6.
[2] CP 7; CP 52.
[3] CP 8, CP 83.

September 12, 2005.[4] On August 24, 2005, Jesus changed his plea to guilty.[5] He was sentenced on that same day to one month in jail.[6] At the time of sentencing, the Court did not advise him that he had one year to file a collateral attack.[7] The written judgment and sentence, which did list the limitation on collateral attacks on page 7, was not translated for the defendant.[8]

On November 29, 2009, Jesus Escobar's wife retained counsel regarding a motion to withdraw the guilty plea, with representation formally beginning on December 3, 2009. It was through counsel that she and Jesus learned that there is a one-year time bar for filing a collateral attack. Jesus' wife indicated they were unaware of that limitation.[9]

On November 12, 2010, Jesus Escobar filed a motion to withdraw his guilty plea.[10] The court, after reviewing the motion and the various declarations, set a hearing for the State to show cause why the motion should not be granted.[11] That hearing occurred on December 17, 2010. Because the Court did not ask

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[4] CP 9.
[5] CP 10-17.
[6] CP 18-26.
[7] CP 69-74
[8] CP 18-26; 158-59.
[9] CP 161.
[10] CP 27-53.
[11] P 165.

for an evidentiary hearing as to Escobar's allegations, there was no testimony except for on a limited issue relating to his understanding of English. The Court issued a written ruling on January 19, 2011 denying the motion to withdraw guilty plea.[12] This timely appeal did follow.[13]

Introduction to the appellant, Jesus Escobar

At the time of the motions hearing, Jesus Escobar was 32 years old. Armed with only a seventh grade education, but a lot of determination, Jesus has worked full time for most of his life. Currently he is employed full time as a painter.[14]

Jesus Escobar is married to Vanessa Escobar.[15] (Because of the shared last name, Jesus and Vanessa Escobar will be referred to by their first names.) They have one child together. In addition, the family court granted Jesus full custody of his 8-year-old daughter Alana from his earlier relationship with Tracy Kepner. Even with this burglary conviction on his record, Mr. Escobar was granted full custody of Alana because of his reliability, and the fact that Tracy continues to use drugs and commit crimes.[16] As

[12] CP 201-16.
[13] CP 217.
[14] CP 154.
[15] CP 160.
[16] CP 160-61; See CP 87-95 (paperwork from custody case).

revealed in the State's witness list and police report, Tracy and her friend Bill were the main state witness against Jesus in the burglary charge.[17]

Background Facts relating to Jesus Escobar and Tracy Kepner

Tracy and Jesus first met back in 1999 while she was tending bar in Shelton. Tracy was a cocaine, marijuana and meth user; however, Jesus was unaware of the meth use when they first began living together. Although Tracy has been through court ordered drug treatment following separate possession and delivery charges, she began using again shortly after finishing the required treatment. Tracy had a son from a prior relationship, but she had lost custody of that child before she met Jesus.[18]

Jesus and Tracy moved in together within months of meeting each other in 2000; although, there were periods during which Jesus would move out of the house. In 2002, Tracy and Jesus had a daughter, Alana, together. In 2004, they moved to Poulsbo.[19] At that time, Tracy's use of drugs became more obvious to Jesus. More of her friends began crashing out at their house. Because he was working so many hours, Jesus did not spend much time at

[17] CP 150-153.
[18] CP 154-155.
[19] CP 155.

home. It was during this time period, that Jesus found a meth pipe in his basement. Jesus does not use meth, and the discovery of the pipe in the house with his daughter was very upsetting to him.[20]

Bill Gill, a friend of Tracy's, began staying at their house in Poulsbo. Bill did not pay rent, but would occasionally help out with chores or childcare.[21] In later 2004 Bill was fired from Mitzel's (a restaurant) for theft.[22] Tracy, who also worked there, was herself fired a few months later for theft.[23] She was convicted the following year.[24]

In May of 2005, Jesus' arguments with Tracy over the care of their daughter continued to escalate. Jesus was concerned about what was happening at the house, and at one point, called the police to report the drug usage. He had thought that Tracy would get in trouble, but Bill was the one who was home when the police came. Bill was arrested on drug charges and taken to jail, where

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[20] CP 155.
[21] CP 155.
[22] CP 156; See CP 111-129 (Court paperwork regarding Bill's theft conviction)
[23] CP 156; See CP 97-102 (court paperwork relating to Tracy Kepner's theft); CP 104-109 (court paperwork relating to Tracy Kepener's more recent criminal history).
[24] Id.

he spent a little more than a month.[25] Bill was extremely upset with Jesus over the incident.[26]

Shortly before this burglary incident for which he was arrested, Jesus had begun spending the night at a friend's house. During this time, he continued to have an on-again/off-again sexual relationship with Tracy.[27] This increased in frequency while Bill was in jail. Jesus also continued to pay the rent. Tracy told Jesus that he could come over anytime he wanted to see his daughter. She also told him he did not need to knock, he could just come right in. This was easy to do, as the front door was never locked.[28] On those evenings Jesus came over to see his daughter, he normally spent the night at the house (sometimes in Tracy's bed, and sometimes not).[29]

The Incident as Described by Jesus Escobar

This incident occurred on July 21, 2005. Jesus had not seen Alana for three days, which was a long time for him.[30] He had spoken with Tracy earlier in the day and confirmed with her that he was going to come over and see Alana. He called shortly before

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[25] CP 156.
[26] CP 157.
[27] CP 156.
[28] CP 156.
[29] CP 156.
[30] CP 156.

arriving, hoping to talk with Tracy for a moment. Bill said that she was in the shower. But when Jesus called back a short while later, Bill rather rudely told Jesus that he could not talk to Tracy because she had gone to the store.[31]

Because Tracy usually did not take Alana to the store in the evening, Jesus came over to the house to see his daughter. He also knew that Tracy does not usually spend very long at the store. On his arrival, however, Tracy was still not home. When Jesus walked in, Bill confronted him. Bill, angry at Jesus for calling the police about the drug use at the house, told Jesus that he had to leave the house. Jesus hotly responded that it was not Bill's decision, as Bill did not pay rent and Tracy had given Jesus permission to come over anytime. This upset Bill even more. As Bill became increasingly agitated, Jesus became even more concerned about the safety of his daughter. Jesus began going room to room looking for her. [32]

After determining that neither Tracy nor his daughter was present, Jesus left the house. He did not assault Bill, nor did he break any glass in the house (as alleged by Bill).[33]

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[31] CP 156.
[32] CP 157.
[33] CP 157.

The Court Proceedings and Assigned Counsel

Jesus was later arrested and put in jail. When he appeared for his arraignment, the court determined an interpreter was necessary, so the hearing was set over.[34] Following an arraignment three days later, Larry Knappert was assigned to represent Jesus.[35] Mr. Knappert was not the attorney present at the time of arraignment.[36]

Jesus could not make bail, and so was unable to travel to Mr. Knappert's office for a consultation. Jesus tried calling him many times, but was unable to reach him by telephone.[37] Finally, two days prior to the scheduled pretrial hearing, Mr. Knappert came to the jail to talk with Jesus. Unfortunately, Mr. Knappert did not bring an interpreter with him. Jesus, with his limited experience in the court system, did not know that an interpreter could have been provided for the jail visit. Although Jesus spoke some broken English, the communication was difficult.[38]

In the jail, Mr. Knappert did not read the police report to Jesus. Instead, he just read some parts, summarizing the rest.

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[34] CP 7.
[35] CP 9.
[36] See CP 77
[37] CP 157.
[38] Id.

Jesus told his attorney that he did not commit this offense, and that Tracy had given him permission to enter the house. His attorney told him that it was two against one, and that a jury would find him guilty. The attorney also advised Jesus that he had not yet spoken to any witnesses, and that he would not be ready for a trial anytime soon. Mr. Knappert told Jesus that he would use an investigator if Jesus really wanted a trial, but that this would take many months and a jury would still find him guilty. The attorney did not ask Jesus very many questions about what had happened, nor did he ask Jesus background questions about Bill and Tracy, the two primary state witnesses.[39]

Even though Jesus told his attorney that he did not commit this offense, pleading guilty appeared to be the only acceptable way to proceed in light of what his attorney was telling him.[40] Further, because Jesus had been in custody for four weeks, and still nothing had been done, Jesus did not have faith that Mr. Knappert was going to prepare much of a defense, even if given more time.

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[39] CP 158.
[40] CP 158.

When Jesus went to court to change his plea to guilty, there was an interpreter who went over the plea statement with him[41]. On the same day as the plea, the court sentenced Jesus to one month in custody, with credit for time served.[42]

Jesus would not have plead guilty but for his attorney telling him that he would be found guilty if he went to trial, combined with the reasonable fear that the attorney was not inclined to do much in his case, and that Jesus would have to wait for several months in order to have a trial.[43]

The Motion to Withdraw Guilty Plea

At the time Jesus entered the plea, the court did not inform Jesus that he only had one year in which to file a collateral attack. Although there was reference to this limitation on page 7 of the judgment and sentence,[44] Jesus had never learned to read English. Nor did the interpreter read the judgment and sentence to him in court.[45] Jesus first learned of the one-year period when his wife

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[41] CP 11-17; CP 69.
[42] CP 18-26; CP 73.
[43] CP 159.
[44] CP 18-26.
[45] CP 159.

contacted an attorney in late November of 2009 to see about withdrawal of the plea.[46]

On November 12, 2010, Jesus filed a motion to withdraw his guilty plea, putting forth the facts set forth above.[47] The motion was supported by declarations from Jesus Escobar, Vanessa Escobar, and James Dixon, as well as various court documents.[48] Sadly, Jesus' prior attorney had passed away a few years earlier, so there was no declaration from him. A review of the attorney's file, however, revealed that he had not spoken to any witnesses, nor had he taken any action other than requesting funding for an investigator shortly after he was assigned the case.[49]

The trial court reviewed the motion and declarations. The trial court did not feel the need to set an evidentiary hearing to determine the credibility of the declarations. Rather, after reviewing the material the court determined that the defense had already made a substantial showing, and that it was now incumbent upon the State to come forward with good cause why the relief should not granted.[50]

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[46] CP 161.
[47] CP 27-153.
[48] CP 27-164.
[49] CP 133, 163.
[50] CP 165-66.

The State did not come forward with any evidence rebutting Jesus' claims. Instead, the State's argument focused on the perceived need for a defendant to back up his claim with additional evidence. The State suggested that a defendant's allegations, without more, cannot support a motion to withdraw a guilty plea.[51]

The State also initially challenged the timeliness of the motion, but conceded at the time of the hearing that the one-year time bar for bringing a collateral attack did not apply if Jesus did not read English. There was a little testimony on that one issue, but other than that, there was no testimony presented at the show cause hearing.

On January 21, 2011, the court issued a written ruling denying the motion to withdraw guilty plea. As an initial matter, the court agreed that the motion was timely as a result of the trial court's failure to advise the defendant of the one-year limitation on bringing a collateral attack.[52] As to the merits of the motion, however, the court agreed with the State that the defendant could not prevail on an ineffective assistance of counsel claim without independent support of the defendant's allegations: "The defense claims of the defense attorney's inadequacies are based solely on

[51] See CP 167-189.
[52] CP 201-202.

the defendant's assertions without sufficient evidence in support of the claims."[53] The court then listed other witnesses that might have been able to help confirm or repute the defendant's claims.[54]

In addition, the court expressed concerns as to whether the failure to interview the witnesses could be considered a deficient performance under these facts. Again, however, the court fell back on the fact that there was no corroboration of the defendant's claims:

> "In fact, unlike the A.N.J. case, the sole evidence against Mr. Knappert is what the defendant claims did or did not occur. This contrasts sharply with A.N.J. In the A.N.J. case, the attorney whose performance was deemed ineffective, testified at court hearings and prepared declarations, which supported his ineffective performance."[55].

The court concluded that the defendant had not met his burden of proving ineffective assistance of counsel.[56] The court did not enter specific findings of fact or conclusions of law.

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[53] CP 209-210.
[54] Id.
[55] CP 212.
[56] CP 214.

III. ARGUMENT

A. THE COURT CORRECTLY DETERMINED THAT THE ONE-YEAR TIME BAR FOR BRINGING A COLLATERAL ATTACK DID NOT APPLY IN THIS CASE.

Under RCW 10.73.090, any type of collateral attack, such as a motion to set aside a guilty plea, must be brought within one year of the date a judgment becomes final. In the present case, Mr. Escobar did not file an appeal, and so his judgment would have become final in 2006.

This rule is not absolute. Rather, given the harshness of this rule, trial courts are required to give notice of this time limitation at the time of sentencing. As set forth in CrR 7.2,

> Procedure at Time of Sentencing. The court shall, immediately after sentencing, advise the defendant: . . . (6) of the time limits on the right to collateral attack imposed by RCW 10.73.090 and .100. These proceedings shall be made part of the record.

This notification requirement is also set forth in RCW 10.73.110, which provides: "At the time judgment and sentence is pronounced in a criminal case, the court shall advise the defendant of the time limit specified in RCW 10.73.090 and RCW 10.73.100."

The lower court in the present case correctly concluded that the one-year time bar does not apply to Jesus, because the trial court never informed him of the time limitation. In doing so, the

trial court relied upon State v. Gordon, 112 Wn. App. 68, 47 P.3d 587 (2002).

In addition to Gordon, this Court's more recent 2007 decision in State v. Schwab[57] support's the lower court's ruling. In Schwab, the defendant moved to withdraw his guilty plea based on ineffective assistance of counsel. Schwab's motion was first brought more than a year after he entered the plea. Even though there was credible evidence that his attorney told him after the sentencing hearing that he only had one year in which to bring a collateral attack, there was no evidence in the record that the court had notified Mr. Schwab of this fact. The State argued that the motion was time barred, but this Court disagreed: "When a statute requires that a court or DOC notify a defendant of a time bar and the notice is not given, this omission creates an exemption to the time bar and a court, therefore, must treat the defendant's petition for collateral review as timely." [58]

In the present case, Jesus did not learn of the one-year limitation until November of 2009. He brought his motion in a timely fashion after learning of that limitation.

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[57] 141 Wn. App. 85, 167 P.3d 1225 (2007).
[58] Id. at 91.

B. THE COURT ERRED IN DENYING THE DEFENSE MOTION TO SET ASIDE THE GUILTY PLEA.

1. **The court erred in concluding that a defendant's own testimony cannot support a motion to withdraw guilty plea.**

As noted above, the State argued in some detail that a defendant's own statements could not support a motion to withdraw his plea. The State quoted at length from cases describing the difficult obstacles facing defendants alleging an involuntary plea. Unfortunately, the quoted material is largely irrelevant, as Mr. Escobar has not challenged the voluntariness of his plea. He has brought an ineffective assistance of counsel claim.

Ineffective assistance of counsel and involuntariness are two separate issues, either of which can support withdrawal of a plea.[59] An involuntary plea is one that is coerced or made under some form of duress. For instance, in State v. Williams,[60] the court held that a guilty plea is involuntary and invalid if it is obtained by mental coercion overbearing the will of the defendant. Courts place a particularly heavy burden on defendants claiming their will was overcome. The justification for this burden is simple. Trial judges

[59] State v. Pugh, 153 Wn. App. 569, 577 (2009); State v. Taylor,83 Wn.2d 594, 597 (1974).
[60] 117 Wn. App. 390, 71 P.3d 686 (2003).

inquire at some length into the voluntariness of a plea. As such, a defendant seeking to withdraw his plea on that basis needs powerful evidence to overcome the earlier assurances of voluntariness. For instance, in State v. Osborne,[61] the Washington Supreme Court noted that "there is nothing in the record to indicate that Osborne's plea was coerced, except for the bare allegation in his affidavit. Osborne specifically stated, several times during the plea proceedings, that his guilty plea was voluntary and free of coercion. More should be required to overcome this 'highly persuasive' evidence of voluntariness than a mere allegation by the defendant." Similarly, in State v. Frederick,[62] the court explained that "a defendant who seeks to later retract his admission of voluntariness will bear a heavy burden in trying to convince a court or jury that his admission in open court was coerced." Requiring compelling evidence under these circumstances makes sense.

By contrast, on an ineffective assistance of counsel claim, the defense's only burden is to show that there is a reasonable probability that but for defense counsel's inadequate

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[61] 102 Wn.2d 87, 97, 684 P.2d 87 (1984).
[62] 100 Wn.2d 550, 556, 674 P.2d 136 (1983), overruled on different grounds in Thompson v. DOL 138 Wn.2d 783, 982 P.2d 601 (1999).

representation, the defendant would not have pled guilty.[63] Unlike the issue of voluntariness, a plea judge does not normally question the defendant about the representation he has received. Thus, there are no assurances by the defendant that need to be overcome.

Unfortunately, even though the lower court did not cite to the State's cases, the court did agree that the law required something more than just the defendant's claims. It is important to bear in mind, that the court did not find Jesus Escobar's testimony lacking in credibility. Certainly a trial judge has the ability to find a defendant's claims incredible and unworthy of belief in the absence of other evidence. But that is not the case before this Court. Instead, the lower court simply accepted the State's argument that a defendant's testimony alone, no matter how credible, was insufficient to carry the day.

In fact, when this Court examines the procedural posture in which the motion was heard, it is apparent that the trial court did accept the declarations from Jesus as credible. When a motion to withdraw a plea is filed, the lower court has a few different options. The Court can deny the motion without a hearing. Alternatively, if

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[63] State v. Garcia, 57 Wn. App. 927, 932-33 (1990).

the Court has questions regarding the credibility of the declarations filed with the motion, the court can schedule a fact-finding hearing. In this way, the lower court can make a ruling on credibility and resolve any factual disputes.[64] Finally, if the declarations are credible and set forth a basis for withdrawing the plea, the court can find that the defendant has made a substantial showing and order a show cause hearing for the State to set forth evidence or argument as to why the relief should not be granted.[65]

The lower court was aware of these different options. In the order setting the show cause hearing, the court stated:

> Pursuant to CrR 7.8(c)(2) and KCrR 7.8(b) this court is required to note a timely motion for further hearing if either the defendant has made a substantial showing that he is entitled to the relief sought or if resolution of the motion will require a factual hearing. Here the court has determined that Mr. Escobar has made a substantial showing that his motion is timely, and that he is entitled to the relief sought.[66]

Based on this finding, the court concluded that the state "shall show cause why the relief requested by the defendant shall not be granted."[67]

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[64] CrR 7.8(c)(2)
[65] Id.
[66] CP 165
[67] Id.

At this point, it was incumbent upon the State to come forth with some evidence or argument as to why these facts do not give rise to ineffective assistance of counsel. Instead of doing that, the State, for the most part, simply claimed that the defense should come forward with additional evidence beyond his own testimony to support his claims. While this argument might have some merit if there was some factual question regarding the accuracy or reliability of Jesus' testimony, such was not the case here. The court found that Jesus had shown he was entitled to relief in the absence of evidence to the contrary.

The lower court was misled into believing that something other than credible testimony was required. This was a mistake in law, and for that reason alone, the court's denial of the motion to withdraw guilty plea was error and should be reversed.

The issue before the court should have been whether the allegations set forth by the defense support the withdrawal of the guilty plea. As set forth below, the answer to that question is an unequivocal yes.

2. The declarations submitted to the court, which were not rebutted, establish ineffective assistance of counsel.

The state and federal constitutions guarantee a criminal defendant the right to effective assistance of counsel.[68] In the plea bargaining context, effective assistance of counsel requires counsel to "actually and substantially" assist the client in deciding whether to plead guilty.[69]

To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's deficient performance the result of the proceeding would have been different. [70] "When a challenge to a guilty plea is based on a claim of ineffective assistance of counsel, the prejudice prong is analyzed in terms of whether counsel's performance affected the outcome of the plea process."[71] One of the key factors in deciding that issue is whether the defendant would have pled guilty as charged in the absence of the deficient performance. [72]

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[68] U.S. Amend 14; Wash const, Art. 1, section 22.
[69] State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984), quoting State v. Cameron, 30 Wn. App. 229, 232 (1981).
[70] Strickland v. Washington, 466 U.S. 668, 687-88, 04 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
[71] State v. Garcia, 57 Wn. App. 927, 932-33, 791 P.2d 244 (1990), citing Hill v. Lockhart, 474 U.S. 52, 59 (1985).
[72] Garcia, 57 Wn. App. at 933.

In order to establish prejudice, a defendant need not show that counsel's deficient conduct "more likely than not altered the outcome in the case."[73] Rather, a defendant only need show a reasonable probability that the outcome would have been different but for defense counsel's mistakes. Both Washington and federal courts recognize that this is a lower standard than preponderance of the evidence, a standard requiring only "a probability sufficient to undermine confidence in the reliability of the outcome." [74]

A motion based on ineffective assistance of counsel is not a referendum on the ethics of a particular attorney.[75] Rather, it is a question of whether the attorney failed to provide effective representation in a particular instance. An attorney has an affirmative obligation to assist a defendant "actually and substantially" in determining whether to plead guilty.[76] While an attorney is presumed to be competent, that presumption can be

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[73] State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987), quoting Strickland at 693.
[74] In re Fleming, 142 Wn.2d 853, 866, 16 P.3d 610 (2001), quoting Strickland at 694.
[75] State v. A.N.J., at 120, fn 18.
[76] State v. Stowe, 71 Wn. App. 182, 186, 858 P.2d 267 (1993)

overcome by showing that counsel failed to conduct appropriate investigations.[77]

As the Supreme Court has observed, a guilty plea is a serious and sobering occasion[.]"[78] Accordingly, it is well accepted that a defense attorney must acquaint himself with the facts of the case well enough to advise the client as to his viable options and the likely outcome associated with those options. This involves a review of the police report, a detailed discussion of the facts with the client, and some investigation into the State's allegations. Counsel must then spend sufficient time with his client to ensure the defendant is able to make an informed and meaningful decision whether to plead guilty.

The Washington Supreme Court's 2010 decision in State v. A.N.J.[79] demonstrates this point. In that case, a juvenile pled guilty to a sex offense. Following his plea, he moved to set aside the plea and proceed to trial. A.N.J. argued that he received ineffective assistance when his attorney advised him to plead guilty without first conducting meaningful investigation. The attorney also

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[77] State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978), review denied, 90 Wn.2d 1006 (1978); American Bar Association Standards for Criminal Justice, (Second Edition, 1986), Standard 4-4.1, page 4-53

[78] Santobello v. New York, 404 U.S. 257, 264. 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

[79] State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010).

misadvised the child about sex offender registration. The State responded that no investigation is necessary once the defendant expresses a desire to plead guilty.[80] Not so fast, said the Washington Supreme Court. There is a duty imposed on defense attorneys to provide meaningful advice relating to plea offers. In most instances, this requirement cannot be satisfied without the attorney first conducting some investigation into the facts surrounding the case. The fact that a client admits guilt and wants to plead guilty does not eliminate this requirement. [81]

The Supreme Court found that counsel failed to provide meaningful assistance in the decision to plead guilty. The Court recognized that some form of defense investigation is needed before advising a client to enter a plea. Further, professional standards, while not binding, "are often useful to courts in evaluating things like effective assistance of counsel."[82] Particularly helpful in assessing the performance of counsel, are the standards established by the Washington Defender Association (WDA), as well as the Washington State Bar.[83] The WDA standards recognize that "criminal investigation is an essential element of criminal

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[80] Id. at 109-110.
[81] Id.
[82] Id. at 110.
[83] Id.

defense" and that "the failure to provide adequate pre-trial investigation may be grounds for a finding of ineffective assistance of counsel."[84] The American Bar Association is equally emphatic as to defense counsel's obligations:

> Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.[85]

As stated by the Washington Supreme Court in A.N.J., "there are precautions so imperative that even their universal disregard will not excuse their omission."[86] One of those imperatives is that you do not plead a client guilty to a felony charge, particularly one with immigration consequences, without conducting any type of investigation.

Here, defense counsel obviously recognized the need for investigation, as he early on requested funding for an investigator.[87] In the motion for funds, Mr. Knappert noted that there were several witnesses to be interviewed by the defense, and that "[b]ased on my professional opinion, the defendant will receive inadequate

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[84] WDA, Standards for Public Defense Services, at 52-53 (2006).
[85] ABA, Standards for Criminal Justice, Defense Function, std. 4-6.1(b).
[86] State v. A.N.J., at 110, citing Texas & Pacific Railroad v. Behymer, 189 U.S. 468, 519, 23 S. Ct. 622, 47 L. Ed. 905 (1903).
[87] CP 131-132

assistance of counsel unless said investigation is made."[88] And yet, despite this recognition, defense counsel strongly urged Jesus Escobar to plead guilty without conducting any of that necessary investigation. As noted by the authorities above, this lack of investigation constitutes a deficient performance.

Had he conducted even a rudimentary check into the State's witnesses' background, he would have discovered recent acts of dishonesty, which would have been admissible against both Tracy and Bill. Both of them had recently stole from their employer, acts which would have been admissible under ER 609 for Bill and ER 608 for Tracy.[89] As to Bill, defense counsel could have explored how he not only engaged in sophisticated acts of deception—performing fraudulent refunds on the register after stealing the manager's key—but that he then lied when confronted by his employer with the evidence. (It is not surprising that Bill committed an act of forgery not long after Jesus pled guilty, for which he was convicted).[90] As to Tracy, although she did not steal as much from her employer, she also used a sophisticated means of hiding her thievery from those who trusted her. All of this would have

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[88] Id.
[89] See State v. Kimp, 87 Wn. App. 281, 941 P.2d 714 (1997) (defendant's recent theft from employer admitted under ER 608).
[90] CP 136-148 (Forgery paperwork from 2006).

seriously undercut their credibility in the allegations they made against Jesus.

Furthermore, Jesus' report to the police of the drug activity at the house would have been admissible to establish Tracy and Bill's motive and bias against him, ensuring the jury would have heard more about the lifestyle led by the two state's witnesses. All of this would most likely have changed defense counsel's stated belief that Jesus would be found guilty because it was "two witnesses against one." At the very least, had Jesus been told that the witnesses' convictions and drug activity were admissible evidence, there is more than a reasonable possibility it would have prompted Jesus to demand a trial.

Unfortunately, Mr. Knappert's deficient performance did not end there. He told Jesus that in order to go to trial, it would take at least a few more months to prepare. Once again, while this may be a common practice because of significant caseload issues, it is not appropriate under the law. To the contrary, as this Court has explained: a trial court's decision to grant a continuance beyond speedy trial should not be granted because of delay on the part of defense counsel, "but because of the complexity and length" of the

case.[91] By waiting to begin the investigation until a month after the arraignment, and apparently having other cases demanding his attention, Mr. Knappert's delay put Jesus in the untenable position of having to plead guilty or remain in custody past his speedy trial expiration date.

Compounding all of these deficiencies, Mr. Knappert neglected to bring an interpreter to the jail and failed to remain at the jail long enough to ensure there was meaningful communication between client and attorney. All of these factors came together to create a perfect storm in Jesus' case. As such, defense counsel never learned that there were very viable defenses to the State's allegations, and that this was not simply a "two against one" case.

In addition to misunderstanding what it is that the defense has to prove, it appears that the court also misunderstood some of the facts and arguments in the case. For instance, the court stated that there was no requirement that defense counsel personally interview all witnesses prior to a guilty plea.[92] But the defense never claimed that defense counsel should have interviewed all of the witnesses or even that he should have personally interviewed the key

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[91] State v. Saunders, 153 Wn. App. 209, 218, fn. 8, 220 P.3d 1238 (2009), quoting State v. Campbell, 103 Wn.2d 1, 14-15, 691 P.2d 929 (1984).
[92] CP 210.

witnesses. The deficiency here is that he did not have even an investigator interview any of the witnesses. Given the type of witness in this case—questionable people with criminal histories and motive to lie—the failure to interview them is significant.

The lower court notes that in A.N.J. that the defense attorney admits that he only spent 55 minutes talking to the client. But in our case, the defense attorney spent even less time talking to Jesus about the case, and there was a language barrier to boot. The lower court in our case also cited to In re Matter of Pirtle,[93] for the proposition that interviews are not necessarily required. But in that case, the evidence revealed that although defense counsel did not conduct any formal interviews, he spent significant time reviewing the evidence and having numerous questions answered by the lead detective and his assistant. In the present case, however, there is no suggestion in the attorney's file notes that defense counsel took even those rudimentary steps. Moreover, as discussed above, given the nature of the witnesses in this case, to simply rely upon the information they provided to the police was unreasonable.

The lower court notes believed that defense counsel could have reasonably perceived this case as more than a "2 against 1"

[93] 136 Wn.2d 467, 488, 967 P.2d 593 (1998).

story based on the police witnesses. But everything that the lower court cited to as supportive evidence was information given to the police by Tracy and Bill. The court cites to things that Bill or Tracy told the police, but that does not make the police a witness against Jesus. The court cites to the way that the scene looked after the police were called to the scene by Bill. But it was the defense theory that Bill—who was a theft and drug addict with a grudge against Jesus—messed up the house himself to incriminate Jesus. The responding officers would not have been able to shed any light on who did what in this case. Contrary to the lower court's assertion, this was a "2 against 1", where both witnesses against Jesus were of questionable reputation and character. At a bare minimum, Jesus' accusers should have been interviewed and their background investigated.

The lower court stated that Jesus "did not claim that he did not understand Mr. Knappert" when they spoke about the case at the jail.[94] But that is exactly what Jesus said in his declaration:

> He [Mr. Knappert] did not bring an interpreter with him. I assumed that the interpreter was something I could have only at court hearings. Because my

[94] CP 211.

> English was not very good, we could talk some, but I think we had a hard time understanding each other.[95]

Competent counsel would have spent more time interviewing witnesses, investigating the case, and talking with his client (with an interpreter) instead of talking him into pleading guilty as charged. As a result of that deficient performance, Jesus Escobar entered a plea to a crime he did not commit. As he stated in his declaration, Jesus would never have pled guilty had he been represented by an attorney willing to put the necessary time into the case. The lower court erred in holding otherwise.

C. CONCLUSION

For the reasons set forth above, appellant asks this Court to reverse the lower court and allow him to withdraw his guilty plea. In the alternative, Jesus is entitled to a new hearing in which the court correctly applies the law. Specifically, the lower court should understand that credible testimony from a defendant—whether in the form of live testimony or a declaration—is sufficient to support a motion to withdraw a guilty plea.

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[95] CP 157.

Respectfully Submitted on this 30th day of September, 2011

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CERTIFICATE OF MAILING

I certify that I placed in the U.S. Postal Mail a copy of the foregoing Brief of Appellant to Jeremy Morris of the Kitsap County Prosecutor's Office, postage prepaid, on September 30, 2011.

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